STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 22, 2014
v	No. 315195 Wayne Circuit Court
JOHNNY RILEY, Defendant-Appellant.	LC No. 12-009225-FC

Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of one count of armed robbery, MCL 750.529, one count of assault with a dangerous weapon ("felonious assault"), 750.82, and one count of possession of firearm during the commission or attempted commission of a felony ("felony-firearm"), MCL 750.227b, following a jury trial.[1] Defendant was sentenced to 135 months to 25 years in prison for the armed robbery conviction, time served for the felonious assault conviction, and two years for the felony-firearm conviction. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

At around 9:30 p.m. on August 21, 2012, Anthony Stoutermire, an employee of Happy's Pizza, was attempting to make a delivery to an address on East Outer Drive in Detroit. Stoutermire arrived at the delivery address, but observed that the house was dark and the doors were closed, so he parked across the street and called the number on the delivery ticket. After speaking with someone who said "here we come now," Stoutermire observed two men

[1] Defendant was initially charged with, and bound over on, one count of assault with intent to rob while armed, MCL 750.89, in addition to the felonious assault and felony-firearm counts. The prosecution filed an amended information charging defendant with one count of armed robbery, MCL 750.529, in addition to the felonious assault and felony-firearm counts. After the filing of the amended information, defendant brought a pretrial motion to quash the information or reduce the charges, which motion the trial court denied. Defendant was convicted as charged in the amended information. On appeal, defendant does not challenge the amendment of the charges or the court's ruling on the motion to quash.

approaching him on foot, and grew concerned when they "separated," as if to "flank" him from the rear and the front. One of the men had a pistol and started running toward Stoutermire, telling him to "[g]ive me everything in your pocket, take everything out [of] your pockets." Stoutermire was afraid and fled on foot. The man with the gun chased Stoutermire for almost a block, and caught him by the back of his jacket. Stoutermire thought he was "about to die" when the man pulled him down. Stoutermire had a .22 caliber Derringer and fired two shots at his assailant. Stoutermire did not initially inform police that he possessed a gun, because he was a convicted felon.

At trial, the prosecution produced defendant's recorded jail calls. Selected portions of the calls, between defendant and a woman believed to be defendant's sister, were played for the jury. As part of its closing argument, the prosecution stated that "[t]he defendant is the reason why pizza companies do not want to deliver pizzas in the city of Detroit." The prosecution also addressed the credibility of Stoutermire, stating that "he also admitted that he lied to the police when he first talked to the police at the scene. And he told you why." The prosecution further addressed Stoutermire's credibility during rebuttal argument, saying, "[a]nd although he lied initially, he came forward and told the truth and was willing to face the consequences of his actions."

II. RIGHT TO CONFRONTATION

Defendant first argues that he was denied his constitutional right to confrontation when his jail call recordings with his sister, implicating him in the crimes charged, were played for the jury, and that the trial court improperly admitted the recorded testimonial statements of defendant's sister, because she did not appear at trial and was never subject to cross-examination. We disagree.

A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). However, the determination whether a defendant was denied his right of confrontation presents a question of law that is reviewed de novo. *People v Fackelman*, 489 Mich 515, 524; 802 NW2d 552 (2011).

The Confrontation Clause, US Const, Am VI, prohibits testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *People v Jackson*, 292 Mich App 583, 594; 808 NW2d 541 (2011), citing *Crawford v Washington*, 541 US 36, 53–54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Confrontation Clause does not bar out-of-court statements that are used for purposes other than establishing the truth of the matter asserted. *Crawford*, 541 US at 59 n 9; *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007). The Confrontation Clause applies only to statements used as substantive evidence. *Cf. Tennessee v Street*, 471 US 409, 413-414; 105 S Ct 2078; 85 L Ed 2d 425 (1985) (holding that evidence admitted solely for impeachment purposes did not violate the confrontation clause); *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004). Further, the right of confrontation is concerned with a specific type of out-of-court statement, i.e., the statements of "witnesses," those people who bear testimony against a defendant. *Crawford*, 541 US at 51.

Selected portions of the recorded jail calls between defendant and defendant's sister were admitted, over defendant's objection, into evidence and played for the jury. The first statement related to defendant's apparent willingness to plead guilty to a weapons charge, in which defendant is heard to say, "I said I'd—I'd take the gun but that's the only charge I'm trying to take though. That's it." The next two excerpts related to defendant's apparent disbelief that he could be charged with and convicted of armed robbery even though he himself did not personally take anything from Stoutermire. Defendant first asked of his sister, "[c]ause I didn't even take nothing, so how can they charge me with armed robbery?" In the final excerpt, defendant states, "somebody took old dude's car keys; the police had the car keys in custody," to which defendant's sister replied, "No—no, no, no, listen. Darius said that Dan came back, I guess you all ordered some wings and some pizza. Darius came back with the wings and the pizza[,]" Defendant responded, "oh."

The record shows that the prosecution offered, and the trial court admitted into evidence, a CD recording of the jail call exchanges between defendant and his sister for the purpose of admitting defendant's inculpatory statements, as opposed to the statements of his nontestifying sister. For example, during closing arguments, the prosecutor argued to the jurors that "[y]ou heard the jail calls that the defendant made from the Wayne County Jail. He takes ownership of the .9 millimeter that was recovered at the scene. I'll take the gun." Defendant's statement was admissible under MRE 801(d)(2). In addition, the prosecutor argued that defendant was guilty of the armed robbery charge through an aiding and abetting theory, and used portions of defendant's conversation with his sister to support that theory. Indeed, defendant's responses support the inference that defendant participated in the robbery, even though defendant, having been shot, may have taken nothing.

Defendant argues that it was the statements of defendant's sister that were improperly admitted and used as evidence against him. The sister's side of the conversation was admitted as part of the playing of the recorded conversation. However, the statements of defendant's sister were not testimonial. Testimonial statements are those used as substantive evidence, or those of witnesses who bear testimony against a defendant. *Fackelman*, 489 Mich at 528. It was defendant's statements, not his sister's, that were of evidentiary importance. The statements of defendant's sister, as the court observed in making its evidentiary ruling to allow the admission of the excerpts of the jail conversations on the CD recording, were necessary merely because they "put[] in context [defendant's] statements." It was defendant's admissions, admissible under MRE 801(d)(2), that were the evidence the prosecution sought to use as evidence of his participation in the robbery of Stoutermire. Therefore, the confrontation clause was not implicated or violated.

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that tthe prosecution committed misconduct when it (1) improperly vouched for complainant's truthfulness, (2) improperly invited the jurors to abandon their impartiality and sought to enlist them as part of the prosecution's team to rid Detroit of robbers, and (3) impermissibly argued "facts" that were unsupported by the evidence. Again, we disagree.

To preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objected below, unless an objection could not have cured the error or failure to review the issue would result in a miscarriage of justice. *Unger*, 278 Mich App at 234-235. Defendant made no contemporaneous objections to the prosecutor's statements. Therefore, this issue is not preserved for review. When there was no contemporaneous objection and request for a curative instruction, appellate review of claims of prosecutorial misconduct is limited to ascertaining whether there was plain error that affected substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Reversal is warranted only when plain error resulted in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings. *Unger*, 278 Mich App at 235.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutorial misconduct issues are decided on a case-by-case basis, and this Court must examine the record and evaluate a prosecutor's remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

The role and responsibility of a prosecutor differs from that of other attorneys: his duty is to seek justice and not merely to convict. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003); *Dobek*, 274 Mich App at 63. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Dobek*, 274 Mich App at 63-64. Prosecutorial comments must be read as a whole and evaluated in the light of defense arguments and the relationship they bear to the evidence admitted at trial. *Brown*, 279 Mich App at 135.

The goal of a defense objection to prosecutorial remarks is to obtain a curative instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993). A curative instruction is usually sufficient to cure the prejudicial effect of an inappropriate prosecutorial comment. *People v Cain*, 299 Mich App 27, 36; 829 NW2d 37 (2012), vacated in part on other grounds ___ Mich ___ (2013).

The evidence presented to the jury revealed that Stoutermire, the principal witness for the prosecution, was a convicted felon. The evidence further showed that, as such, Stoutermire knew that he was prohibited from possessing a firearm. Stoutermire testified that he was scared both during the robbery and, because of his status as a felon, during the resulting police investigation. Stoutermire admitted at trial that he lied to police, about not having a gun, when he first spoke to them about the robbery. Two days later, after considering the situation further, Stoutermire decided to "tell the truth" about his possession and use of a .22 Derringer handgun during the robbery, and accept whatever consequences might result. The prosecutor's disputed comments were made in the context of these facts during her closing argument and as part of her rebuttal argument. The prosecutor told the jury, "Now, [Stoutermire] also admitted that he lied to the police when he first talked to the police at the scene. And he told you why." The prosecutor further stated, "[a]nd although he lied initially, he came forward and told the truth and was willing to face the consequences of his actions.

A fair reading of the whole of the prosecutor's remarks, *Rodriguez*, 251 Mich App at 30, evaluated in the full context in which they were made, reveals that the focus of the argument was that Stoutermire was honest in his testimony at trial, and was credible, *Mann*, 288 Mich App at 119. A prosecutor may argue that witnesses should be believed. *Unger*, 278 Mich App at 237; see also *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). The point of the prosecutor's disputed remarks was to support her argument that the testimony of Stoutermire, in spite of his status as a felon in illegal possession of a firearm during the charged incident, and in spite of his admittedly having initially lied to the police during their investigation of the crime, was credible at trial and should be believed, and not to "vouch for" complainant personally or through her office. We conclude that these statements were proper. *Brown*, 279 Mich App at 135. Further, the trial court instructed the jurors about witness credibility, and told them they were free to believe all, none, or part of any person's testimony. In addition, no contemporaneous defense objection was made to any of the prosecutor's remarks, nor did defense counsel ask for a curative instruction. We therefore conclude there was no plain error that affected defendant's substantial rights. *Brown*, 279 Mich App at 134.

Defendant also challenges the propriety of the prosecutor's opening line, during closing argument, that "[t]he defendant is the reason why pizza companies do not want to deliver pizzas in the city of Detroit." The prosecutor's statement, while perhaps ill-advised, appears to have been meant to catch the jury's attention through hyperbole, not to be taken literally. This Court has held that such a brief, isolated remark, while arguably improper because it was not supported by the evidence, is not the kind of impropriety that requires reversal, because any undue prejudice could have been cured by a cautionary instruction and the impropriety did not result in a miscarriage of justice. *People v Cooper*, 236 Mich App 643, 650-652; 601 NW2d 409 (1999). Again, no contemporaneous defense objection was made to the prosecutor's statement, nor did defense counsel ask for a curative instruction.

Finally, the trial court twice issued cautionary instructions to the jury regarding the use to be made of the lawyers' statements. First, it stated in the context of an unrelated defense objection, "I want to remind the jurors that what the lawyers say is not evidence. You heard the evidence." Second, during its formal instructions to the jury, the trial court specifically stated, "the lawyer's statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories. . . . You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge." Jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235. Thus, any prejudice to defendant resulting from the prosecutor's statement was cured by these instructions. We conclude that the prosecutor's remark did not result in plain error that affected defendant's substantial rights. *Brown*, 279 Mich App at 134.

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Deborah A. Servitto